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MICHAEL RODAK, JR., C

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1134

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

Respondents.

KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

Petitioners,

v.

SUNRAY D-X OIL COMPANY and SUN OIL COMPANY,

Respondents.

DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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In the Supreme Court of the United States

OCTOBER TERM, 1972

No. .....

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,

Petitioners,

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ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,

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KEN F. MANS, individually and on behalf of all persons employed by Sunray D-X Oil Company and Sun Oil Company as of the date of merger of these two companies,

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DEL JEANNENE JOBE individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical, and the employees of Amerada Hess Corporation,

Petitioners,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL & CHEMICAL CORPORATION, and AMERADA HESS CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgments of the United States Court of Appeals for the Tenth Circuit entered in *Reibert et al. v. Atlantic Richfield et al.*, (judgment entered January 8, 1973), *Mans et al.* v. *Sunray D-X Oil Company*, (judgment

entered January 17, 1973), and *Jobe et al.* v. *Amerada Petroleum Corporation et al.*, (judgment entered February 6, 1973). Review of each decision is sought pursuant to Supreme Court Rule 23-5 for the reason that each case contains identical or substantially similar questions of law.

OPINIONS BELOW

Reibert et al. v. *Atlantic Richfield et al.*

The Court of Appeals' opinion in *Reibert et al.* v. *Atlantic Richfield et al.*, (Appendix A), is not reported. No opinion was written by the District Court. The Findings and Recommendations of the Magistrate, filed on March 20, 1972 (Appendix B) is not reported. The order and judgment of the District Court, entered on March 30, 1972 (Appendix C) is not reported.

Mans et al. v. *Sunray D-X Oil Company et al.*

The Court of Appeals issued a *per curiam* opinion (Appendix D) which will not be published. The opinion was based upon *Reibert et al.* v. *Atlantic Richfield et al.*, (Appendix A). The order of the District Court (Appendix E) issued on May 20, 1971 was not published. Judgment was entered on June 7, 1971 (Appendix F).

Jobe et al. v. *Amerada et al.*

The Court of Appeals issued a *per curiam* opinion (Appendix G) on February 6, 1973 which will not be published and was based upon *Reibert et al.* v. *Atlantic Richfield et al.* (Appendix A). No opinion was written by the District Court. The Findings and Recommendations of the Magistrate, filed on January 11, 1972 (Appendix H) is not reported. The Order and Judgment of the Court (Appendix I) entered March 20, 1972 was not published.

JURISDICTION

The Court of Appeals entered judgment in *Reibert et al.* v. *Atlantic Richfield et al.*, on January 8, 1973; *Mans et al.* v. *Sunray D-X Oil Corporation et al.*, on January 17, 1972 and *Jobe et al.* v. *Amerada Petroleum Corporation et al.*, on February 6, 1973. The jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254 (1).

QUESTIONS PRESENTED

1. ARE THE ANTI-TRUST LAWS AS IMPORTANT TO "MEMBERS OF ANY OTHER CLASS OF WORKERS" AS THEY ARE TO BASEBALL PLAYERS, FOOTBALL PLAYERS, LAWYERS AND DOCTORS? *Flood* v. *Kuhn*, 407 U.S. 258, 292 (1972).

2. CAN LARGE NATIONALLY INTEGRATED OIL COMPANIES MERGE THEIR FACILITIES IN VIOLATION OF THE ANTI-TRUST LAWS AND UNILATERALLY TERMINATE WITH IMPUNITY, THOUSANDS OF AMERICAN WORKERS WHO WERE DECLARED SURPLUS TO THE NEEDS OF THE ORGANIZATION AS A RESULT OF THE MERGER?

3. CAN CORPORATIONS WITH ECONOMIC POWER GAINED THROUGH ANTI-TRUST VIOLATIONS BE PERMITTED TO DO THAT WHICH THE GOVERNMENT ITSELF CANNOT DO—DESTROY THE RIGHT OF EMPLOYMENT OF THOUSANDS OF WORKERS?

4. CAN SOCIETY, UNDER THE INSTITUTIONALIZED "WORK ETHIC", IMPOSE UPON MAN A MORAL AND LEGAL OBLIGATION TO WORK UNDER A COM-

PETITIVE DIRECTIVE, AND THEN DENY HIM ACCESS TO THE COURTS TO PROTECT THE OPEN MARKET AND FREE COMPETITION WHICH MUST BE RELIED UPON TO PRODUCE JOBS?

5. IN A COMPREHENSIVE STUDY OF THE "CONCENTRATION OF ECONOMIC POWER" CONDUCTED BY THE TEMPORARY NATIONAL ECONOMIC COMMITTEE AND ADOPTED BY CONGRESS, IT WAS STATED: "IT IS THE FUNDAMENTAL DUTY OF EVERY SOCIETY WHICH IS DEVOTED TO THE PRINCIPLES OF OUR POPULAR GOVERNMENT TO LEAVE NOTHING UNDONE TO PRESERVE AND GUARANTEE THE OPPORTUNITY TO WORK TO EVERY CAPABLE AND WILLING MAN."

a. Does this mean that Congress, by enacting the federal antitrust laws, was accepting its correlative obligation under the work ethic which provides that a state, with the right to insist that every one work, has the corresponding duty to assure to all its citizens the right to work?

b. Does this mean that Congress was relying upon the forces of free competition to produce and to protect job opportunities?

6. IF, AS WAS HELD IN *UNITED STATES* v. *ALUMINUM COMPANY OF AMERICA*, 148 F.2d 416, 428-429 (2d Cir. 1945), THE PURPOSE OF THE ANTITRUST LAWS "WAS A DESIRE TO PUT AN END TO GREAT AGGREGATIONS OF CAPITAL BECAUSE OF THE HELPLESSNESS OF THE INDIVIDUAL BEFORE THEM", AND "TO PERPETUATE AND PRESERVE, FOR ITS OWN SAKE AND IN SPITE OF POSSIBLE COST, AN ORGANIZATION OF INDUSTRY IN SMALL UNITS," MUST THIS NOT MEAN THAT CONGRESS

WAS SEEKING TO PROTECT AND EXPAND JOB OPPORTUNITIES THROUGH THE FORCES OF FREE COMPETITION?

7. DO EMPLOYEES FALL WITHIN THE AREA OF THE ECONOMY OR ZONE OF INTEREST SOUGHT TO BE PROTECTED BY THE ANTITRUST LAWS?

8. DO SELLERS OF LABOR IN A FREE AND UNRESTRAINED MARKET HAVE RIGHTS EQUAL TO BUYERS OF LABOR?

9. IF FREE COMPETITION IS THE FORCE RELIED UPON BY CONGRESS TO PRODUCE AND PROTECT JOBS, DO EMPLOYEES, INJURED OR THREATENED WITH INJURY AS THE RESULT OF AN ILLEGAL CORPORATE MERGER, HAVE STANDING TO FILE AN ANTITRUST SUIT UNDER SECTION 4 AND SECTION 16 OF THE CLAYTON ACT?

STATUTES INVOLVED

The applicable statutory provisions involved are in pertinent part set forth in Appendix J. Included are the following:

1. Sherman Act, Section 1, 15 U.S.C. sec. 1
2. Clayton Act, Section 4, 15 U.S.C. sec. 15
3. Clayton Act, Section 7, 15 U.S.C. sec. 18
4. Clayton Act, Section 16, 15 U.S.C. sec. 26
5. Interstate Commerce Act,
   a. Sec. 5, 49 U.S.C. sec. 5 (2) (a)
   b. Sec. 5 (2) (c), 49 U.S.C. sec. 5 (2) (c)
   c. Sec. 5 (2) (f), 49 U.S.C. sec. 5 (2) (f)
   d. Sec. 5 (b) (9), 49 U.S.C. sec. 5 (b) (9)
6. 10 Okla. Statutes 1971 sec. 12
7. 32 Okla. Statutes 1971 sec. 3

STATEMENT OF THE CASES

Introduction

The petitioners are asking this Court to review three separate corporate mergers which form a significant part in a general merger trend within the petroleum industry. These three mergers involved six previously independent oil companies with combined assets of nearly seven billion dollars. Considered with the numerous other corporate mergers involving oil companies, the petroleum industry has become highly concentrated. Fifteen of the largest oil companies, in 1968, controlled 75% of the total United States refinery capacity, and produced 61.8% of the domestic crude oil.

As a result of the merger trend and the increased economic concentration, thousands of petroleum related jobs have been eliminated. In the three cases involved in this petition, employees *terminated as a direct result of these mergers* filed private antitrust actions challenging the legality of the mergers.

THE ATLANTIC RICHFIELD-SINCLAIR MERGER

1. Facts of Case

This private antitrust suit was filed as a class action on September 15, 1969 in the United States District Court for the Northern District of Oklahoma to challenge, under the antitrust laws, the legality of the corporate merger of Atlantic Richfield Company and the Sinclair Oil Corporation. Reibert, a highly skilled research technician in the petroleum industry, had been employed by Sinclair for more than 17 years until Sinclair was merged into Atlantic Richfield.

Atlantic Richfield and Sinclair, two highly integrated oil companies operating in a national market, entered into a merger agreement on October 31, 1968. The merger was finally consummated on March 4, 1969. Immediately thereafter, there was a consolidation of facilities of Atlantic and Sinclair which resulted in the termination of employees. The named petitioner, Delbert C. Reibert, a salaried research technician, was terminated on June 13, 1969 when, as part of the merger and consolidation plans, the Sinclair research facilities located in Tulsa, Oklahoma were closed.

Just a few years before this merger, Sinclair had held 50% of the stock of the Richfield Oil Corporation. After Atlantic Refining acquired Richfield, Sinclair owned and held 2,447,162 shares of Atlantic Richfield; however, Sinclair was forced to sell these shares as a result of an antitrust agreement with the Justice Department. Thereafter, Atlantic Richfield turned around and acquired all of the stock of Sinclair. The Atlantic-Sinclair merger created a company with assets in excess of four billion dollars, controlling 7.6% of the national refinery capacity and 43% of the total refinery capacity in the State of Pennsylvania.

As part of the merger and consolidation plans, Atlantic Richfield unilaterally adopted a policy governing terminations resulting from the merger. It was explicitly stated by Atlantic Richfield that:

> "The purpose of this policy is to provide special allowances to certain employees **who will be terminated as a direct result of the merger** of Sinclair Oil Corporation into Atlantic Richfield Company." (Emphasis ours.)

Within the first year following the merger, 4,000 employees were, in the words of Atlantic, "declared surplus to

the needs of the organization as a result of the merger", and were terminated by Atlantic. Of this total number of terminations during the first year, there were 549 persons who had worked for Sinclair for a period longer than fifteen (15) years; and there were 561 persons who had worked for Atlantic for a period longer than fifteen (15) years. With its termination policy adopted as part of the merger plans, the average age of employees retained by Atlantic Richfield was nearly three years lower than it was for the respective companies prior to the merger—from an average of forty-five (45) years of age to an average of 42.13 years of age.

The employees, terminated by Atlantic Richfield as a direct result of the merger, lost their accumulated retirement credits. Persons over a certain age and possessing skills suitable only for the petroleum industry faced reemployment difficulty or they were unemployable. The named petitioner, Delbert C. Reibert, was nearly forty (40) years of age at the time of his termination. He had been with Sinclair for seventeen (17) years, during which time he had become highly skilled. His skill pertained to the petroleum industry and was not easily transferable. Following his termination, Reibert diligently sought, but was unable to find a position that could utilize his highly technical experience gained at the Sinclair Research Lab. In October, 1970, Reibert finally took a job as a draftsman, a position that he had held when he was first employed by Sinclair some eighteen (18) years earlier.

2. The Trial Court

After being terminated as a direct result of the Atlantic-Sinclair merger, the petitioner, Reibert, filed this suit as a class action on September 15, 1969. Petitioner sought treble damages under Section 4 of the Clayton Act (15 U.S.C. sec. 15), and injunctive relief under

Section 16 of the Clayton Act (15 U.S.C. sec. 26) for himself and on behalf of all other Atlantic-Sinclair employees similarly situated. On December 1, 1969, Petitioner filed a motion for partial summary judgment seeking to dispose of certain legal issues including standing of employees to sue under the antitrust laws. This motion was denied on February 24, 1970. From that date until March 20, 1972 when this case was dismissed on the motion for summary judgment filed by Atlantic Richfield, the petitioner engaged in extensive discovery, principally on the question of the legality of the merger. The trial judge adopted the Finding and Recommendations of the Magistrate without comment and dismissed the suit on the ground that employees lack standing under the antitrust laws.

3. The Appeal

On January 8, 1973, the Court of Appeals for the Tenth Circuit affirmed. It concluded that employment was not "business or property" as these terms are used in Section 4 of the Clayton Act (15 U.S.C. sec. 15). It further held that any injury suffered by the employees *was indirect or remote,* although the Court did agree that the employees *were terminated as a result of the merger.*

THE SUNRAY DX-SUN OIL MERGER

1. The Facts

This class action was filed on April 30, 1970 in the United States District Court for the Northern District of Oklahoma by the Petitioner, Ken F. Mans, for himself and on behalf of other employees similarly situated. It challenges the legality of the merger of Sunray DX Oil Company and Sun Oil Company under the antitrust laws and

seeks treble damages and injunctive relief as provided for under Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15, 16).

Sunray DX Oil Company and Sun Oil Company, two similarly structured corporations, prior to their merger were highly integrated oil companies. The merger, effective on October 25, 1968, eliminated all competition previously existing between the companies, and created a corporation with assets in excess of two billion dollars. As a result of the merger, Sun Oil increased its rankings among Fortune's 500 largest industrials to 42 in terms of sales and 28 in terms of assets.

As a direct result of the Sunray DX-Sun Oil merger, the petitioner, Ken Mans, was terminated. He had been with Sunray DX since 1954, and through a number of promotions, he was, at the time of the merger, the manager of compounder-blender sales and was earning $1,360 per month. The first public announcement of how this merger would affect employees came out in November, 1969. Sun Oil announced that 900 jobs in Tulsa would be eliminated (Tulsa World, November 4, 1969 at p. 1). The petitioner, by affidavit, stated to the trial court that he was aware of Sun Oil's plan to reduce its work force by some 3,000 to 4,000 employees.

Sun Oil offered the petitioner a chance to transfer from Tulsa to the Dallas, Texas office. The transfer offered, however, was for a lower job classification with lower wage scale and with lesser responsibility. Instead of accepting this lesser job, the petitioner elected to challenge the merger under the antitrust laws. This decision was made in spite of the fact that it caused the petitioner to be denied the severance pay given to other employees terminated by reason of the merger.

2. The Trial Court

The complaint in *Mans* was filed on April 30, 1970. On May 20, 1971, the trial court entered judgment (Appendix E) on the ground that employees do not have standing under the antitrust laws. The court concluded that the plaintiff was *only a salaried employee* and *not a commission sales agent* with a competitive territory upon which his earnings depended.

3. The Appeal

On January 17, 1973, the Court of Appeals for the Tenth Circuit affirmed and filed a *per curiam* opinion. The Court held that under *Reibert et al.* v. *Atlantic Richfield et al.*, a salaried employee, as opposed to an employee paid on a commission basis, lacked standing to sue under Sections 4 and 16 of the Clayton Act.

THE AMERADA-HESS MERGER

1. Facts of Case

This class action was filed on February 24, 1970 in the United States District Court for the Northern District of Oklahoma by the petitioner, Del Jeannene Jobe, for herself and on behalf of all other employees similarly situated. It challenges the legality of the merger of Amerada Petroleum Corporation and Hess Oil and Chemical Corporation under the antitrust laws and seeks treble damages and injunctive relief as provided for under Sections 4 and 16 of the Clayton Act (15 U.S.C. secs. 15 and 26).

Hess Oil and Chemical Corporation ("Hess") was merged into Amerada Petroleum Corporation ("Amerada") on June 20, 1969. Prior to the merger, Hess was an

integrated oil company engaged in some exploration and production but principally involved in refining and marketing. During 1968, it had sales of about $460,000,000, and as of December 31, 1968, its assets amounted to about $491,000,000. Amerada had been principally engaged in domestic and foreign exploration and production. During 1968, its sales totaled about $256,000,000, and as of December 31, 1968, its assets amounted to $354,000,000.

Prior to the merger, Amerada had no import quota; therefore, to satisfy a domestic market, it was active in domestic exploration and production. Following the merger, the large import quota of Hess allowed the company to curtail domestic production. This is reflected in the fact that many of the employees terminated had previously worked in the area of production. In one reorganizational study, it was shown that the geophysical crews could be reduced from 160 to 35.

As a direct result of the Amerada-Hess merger, the petitioner, Del Jeannene Jobe, was terminated. She was a draftsman in the geophysical department of Amerada and was terminated on February 2, 1970. After the petitioner filed this action, two other employees, terminated on February 2, 1970, joined the suit as plaintiffs. Robert R. McDole was first employed by Amerada in September, 1950 and worked as a geophysical draftsman. Roy E. Michael, the second person to join this suit, was also a draftsman in the geophysical department of Amerada.

2. The Trial Court

The complaint filed in this case was filed on February 24, 1970. After extensive discovery by the plaintiff, the defendants, on December 22, 1971, filed a motion for summary judgment on the ground that claimed loss of employment does not constitute injury to business or prop-

erty. On January 11, 1972, the Magistrate issued a recommended order sustaining this motion (Appendix H). This recommended order was approved without comment by Judge Barrow on March 20, 1972 (Appendix I).

3. The Appeal

On February 6, 1973, the Court of Appeals for the Tenth Circuit affirmed and filed a *per curiam* opinion (Appendix G). Following *Reibert et al.* v. *Atlantic Richfield et al.*, a salaried employee, as opposed to an employee paid on a commission basis, lacked standing to sue under Sections 4 and 16 of the Clayton Act.

REASONS FOR GRANTING THE WRIT

I. The decision below is inconsistent and contrary to established precedent.

Decisions from this Court and other Courts clearly support the standing of employees under the antitrust laws. The lower Court in the case refused to follow this precedent, or distinguished cases on totally spurious grounds. Any person injured in his business or property by reason of anything forbidden by the antitrust laws has standing under Section 4 of the Clayton Act to sue for treble damages.

In *Hawaii* v. *Standard Oil Company of California,* 405 U.S. 251, 264 (1972), this Court approved and adopted the definition of the terms "business or property" as stated in *Roseland* v. *Phister Mfg. Co.,* 125 F.2d 417 (7th Cir. 1942) which was that "business or property" included:

> " 'employment or occupation in which a person is engaged to procure a living.' " (*Id.* 419).

The word "business" as used in Section 4 of the Clayton Act was held in *Roseland* to signify "that which habitually busies; or engages time, attention or labor, as a principal serious concern or interest." *Roseland, supra* at 419.

A man's job clearly fits the definition of "business" that this Court approved in *Hawaii.* He works at his job as a principal serious concern and interest to support himself and his family as he is morally and legally obligated to do. This Court also recognized that salaried employees had standing under the antitrust laws in *Perkins* v. *Standard Oil Company,* 395 U.S. 642 (1969), a decision relied upon by the Court in *Bay Guardian Co.* v. *The Chronicle Publishing Co.,* 340 F.Supp. 76 (N.D. Calif. 1972).

Likewise this Court upheld the standing of employees in *Radovich* v. *National Football League,* 352 U.S. 445 (1957) and *Flood* v. *Kuhn,* 407 U.S. 258 (1972). Yet the lower court in the present case refused to follow these cases and denied standing to the petitioner-employees. The Tenth Circuit also refused to follow *Nichols* v. *Spencer International Press, Inc.,* 371 F.2d 332 (7th Cir. 1967) and *Dailey* v. *Quality School Plan, Inc.,* 380 F.2d 484 (5th Cir. 1967). In substance, the lower Court reasoned that these cases did not apply to a mere salaried employee.

In *Roseland* and *Dailey,* the employees involved were salesmen who, according to the Tenth Circuit "were quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities." (Appendix A, p. A8). On the other hand the petitioner was described as a mere salaried employee who did not operate out of any specific market. Based on this spurious distinction, an aggressive salesman would have standing under the antitrust laws; however, access to the Courts and all antitrust relief would be denied to research technicians, map draftsmen, and other *mere salaried employees.* The reason given by the lower Court for refusing to follow *Radovich* and *Nichols* is equally fallacious.

If the strained distinctions of the Tenth Circuit are allowed to stand, thousands of workers who have faithfully served their corporate employers for many years, will be denied access to the Courts and the lawful protection of the antitrust laws for all employees. The Tenth Circuit has created "an anomaly and an aberration" that will surpass the distinction between baseball and football. *Flood* v. *Kuhn,* 407 U.S. 258 (1972). When access to the Courts depends upon the job description given a man or upon the method by which he is paid, we will have removed the blindfold from the symbol of justice. Thereafter, value judgments, rather than law will control judicial decisions.

When Congress allowed "any person injured in his business or property" by an antitrust violation to sue for treble damages, was it extending protection to commission salesmen and football players and excluding all other employees? Regardless of the job description, the method for computing compensation, or the amount of compensation, the fact is that an employee is an employee. Whether a salesman, geologist, secretary, research technician, football player or other, they are all people living in one society; faced with similar responsibilities; and sharing in the same aspirations. Their job is their "business" and is the vehicle through which they satisfy their obligations to society and to their families.

Reviewing all of the judicial precedent on the question involved in this case, the Court, in *Vandervelds* v. *Put & Call Brokers & Dealers Ass'n*, 344 F.Supp. 118, 153 (S.D.N.Y. 1972), observed: "Until the last decade, Courts denied standing to employees seeking to recover salary lost when their employers' business was injured by an antitrust violation." However, as the Court continued: "More recent decisions have accorded an employee standing."

We have come to recognize more fully the critical importance of the antitrust laws to all American citizens and to all employees. The unfortunate distinction of the Tenth Circuit which classifies employees cannot be allowed to stand. As Mr. Justice Marshall declared in his opinion filed in *Flood* v. *Kuhn*, 407 U.S. 258, 292 (1972):

> "The importance of the antitrust laws to every citizen must not be minimized. They are as important to baseball players as to football players, lawyers, doctors, or *members of any other class of workers.*" (Emphasis added).

II. The lower Court erroneously applies and expands the "directness rule".

One must show that his "business or property" was injured "by reason of anything forbidden in the antitrust laws" to support a claim under Section 4 of the Clayton Act (15 U.S.C. sec. 15). The lower court ruled that the employees did not satisfy this causation language because they could not show that the injury resulted from a *lessening of competition.* With this serious misreading of the language of Section 4, the lower court created a loophole through which most antitrust violators can escape.

Causation, under Section 4, is measured through the words "by reason of anything forbidden in the antitrust laws." A reading of the antitrust statutes shows that *the forbidden act* involved in this case *is the merger* and *not the lessening of competition.* A restraint of trade, standing alone, would not be a violation of Section 1 of the Sherman Act (15 U.S.C. sec. 1). The forbidden act under this section of the antitrust laws is any *Contract* that restrains trade. Likewise, a lessening of competition is not illegal under Section 7 of the Clayton Act (15 U.S.C. sec. 18). The forbidden act under this antitrust provision is the *merger.*

The lower court concedes that the employees were terminated as a direct result of the merger alleged to be illegal and forbidden under the antitrust laws. A clear inconsistency stated by the Tenth Circuit is as follows:

> "At best, appellant's discharge was no more than an outgrowth of the alleged *unlawful merger.* He has failed to show the necessary directness of injury caused by the *illicit acts.*" (Appendix A, p. A12) (Emphasis added).

The inconsistency is illustrated by the emphasized words of the lower court—admitting that the employees were terminated by reason of an *unlawful merger*, but then holding that injury was not a direct result of the *illicit acts*. Under the antitrust laws, the unlawful merger is the illicit or forbidden act. With all due respect for the lower court, its explanation of the statutory requirements of Section 4 is difficult to accept. There appears to be a basic misunderstanding that, at least in this case, reaches great proportions. The lower court states:

> "Terminations of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (Appendix A, p. A11).

We are not concerned with a legal merger in this case; to resolve the issue of standing the illegality of the merger is presumed. It is obvious that if the merger were not illegal, the employees would recover nothing. This surely cannot mean, however, that because an employee may be terminated following a legal merger, he is without standing to sue if the merger is illegal. The admitted right of an employer to terminate employees is based on the assumption that the decision to terminate is reached independent of an antitrust violation. *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962); *United States* v. *Parke Davis and Company*, 362 U.S. 29 (1960); *Simpson* v. *Union Oil Company of California*, 337 U.S. 13 (1964).

The error of the lower court is in its conclusion that the alleged injury is indirect and remote unless it attaches to the "lessening of competition". In support of this conclusion, the lower court notes from *Brown Shoe Co.* v.

United States, 370 U.S. 294, 320 (1962) that Section 7 of the Clayton Act was intended to protect *competition*. It was reasoned from this that the injured employees, to have standing, must show that they were engaged in *competition* within the petroleum industry. It stated that a *competitor* of the acquiring or acquired corporation might have standing to bring this action (Appendix A, pp. A10-A11).

Brown Shoe was not accurately interpreted by the Tenth Circuit. What this Court actually said in *Brown Shoe* and again in *United States* v. *Philadelphia National Bank*, 374 U.S. 321 (1963) was that the purpose of Section 7 of the Clayton Act was to protect competition, *not competitors*. This means that the enforcement of the antitrust laws cannot be left to competitors as the Tenth Circuit would do. Testimony of competitors that the merger involved in *Philadelphia National Bank* was procompetitive was considered by this Court as having very little probative value since the purpose of the statute was to protect " '*competition*, not *competitors*.' " *United States* v. *Philadelphia National Bank*, *supra* at 367 (emphasis belongs to Court).

As used by this Court, the word "competition" has been in reference to "our fundamental national economic policy". *Philadelphia National Bank*, *supra* at 372. Competition is the economic regulator of all matters *including employment*. The Tenth Circuit uses the word "competition" to exclude from the protection of the antitrust laws all but competitors. When this Court gives little probative value to testimony of competitors, it is difficult to see how private enforcement under Section 4 can be limited to competitors. These are unreliable private attorney generals since the competitors are responding by entering into

merger themselves. For example, this Court now has six competing companies to which the Tenth Circuit would leave private antitrust enforcement—Sinclair was merged into Atlantic Richfield; Sunray DX was merged into Sun Oil; and Hess Oil merged with Amerada Petroleum Corporation.

Reliance by the Tenth Circuit on *Billy Baxter Inc.* v. *Coca-Cola Company*, 431 F.2d 183 (2d Cir. 1970), cert. denied, 401 U.S. 923 (1971), and *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), cert. denied 406 U.S. 930 (1972) is misplaced. These cases involved the standing of a franchisor and a landlord. Nevertheless, the petitioner submits that the directness requirements of *Billy Baxter* and *Calderone* are satisfied in this case.

Even if the lower court was considered correct about measuring causal connection to the "lessening of competition", the petitioner satisfies the directness requirement. Corporations can compete only through the actions of people—the employees. Consequently the "lessening of competition" resulting from a corporation merger can be measured by the resulting reduction in the number of employees. This can be seen even from the observations of the lower court. When it stated that the termination of employees is a natural effect of a merger of two similarly structured businesses, it was actually defining the "lessening of competition."

Employees are the most reliable persons to challenge illegal mergers because employees are more directly affected by corporate mergers. Consider: *Office of Communication of the United Church of Christ* v. *F.C.C.*, 359 F.2d 994, 1000-1004 (D.C. Cir. 1966).

III. The lower Court ignored the clearly expressed congressional policy supporting the standing of employees.

Although thoroughly briefed, *the lower court gave no attention to the Congressional expressions and policy* that allows employees injured by an illegal merger to seek treble damages and injunctive relief. From the very inception of federal antitrust laws, Congress recognized the causal connection between economic concentration and employees. As noted in *United States* v. *Aluminum Co. of America*, 148 F.2d 416, 428 (2d Cir. 1945): Congress in 1890 sought to put an end to great aggregations of capital "because of the helplessness of the individual before them". 21 Cong. Rec. 2457 (1890) (remarks of Senator Sherman).

Senator George, speaking of the treble damage provision in the Sherman Act, stated that this section gave standing to the "farmer, mechanic, *laborer* and consumer". 21 Cong. Rec. 3150 (1890). When the Clayton Act was passed in 1914, there was strong Congressional support for private antitrust suits. Senator Borah stated that: "There could be no safer guardian for the Sherman Anti-trust law than the hundreds and thousands of people who are injured by these monopolies." 51 Cong. Rec. 15986 (1914) "Because you are threatening to take money out of his pockets, the offender will begin to open his eyes and show greater obedience for the law." 51 Cong. Rec. 16275 (1914) (remarks of Congressman Webb).

Persons recognized as the ones suffering the most from the great combinations of wealth were identified as "the consuming public", "the struggling poor of our country", *"the employee who loses his job"*, and the "citizens and their children" who desire the right to enter business. 51 Cong. Rec. 16043 (1914) (remarks of Senator Norris); 51 Cong. Rec. 9088 (1914) (remarks of Congress-

man Mitchell). In the final report of the Temporary National Economic Committee of the extensive study of economic concentration, it was stated that the degree of economic concentration was so great that,

> "the opportunity of those individuals who will constitute the next generation will be completely foreclosed unless"

the trends are reversed. Temporary National Economic Committee, Investigation of Concentration of Economic Power, S. Doc. 35, 77th Cong., 1st Sess., 9 (1940) (Referred to hereafter in this petition as TNEC Report.)

The merger trend has already created an economic barrier for any individual to freely enter into many businesses. Within the petroleum industry one can enter business as a service station operator; however, as a producer, refiner and large scale marketer of petroleum products, the market is preempted by industrial giants. About the only thing that an individual can realistically expect is advancement and retirement as an employee. The lower court is allowing large corporations to destroy even this employment opportunity.

Congress provided protection to employees through the antitrust laws. As stated in the TNEC Report: "It is the fundamental duty of every society which is devoted to the principles of popular government to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man." TNEC Report at 6. And as President Roosevelt said on the subject of economic concentration and employment:

> "No people, least of all a democratic people, will be content to go without work or to accept some standard of living which obviously and woefully falls short of their capacity to produce. No people, least of all

a people with our traditions of personal liberty, will endure the slow erosion of opportunity for the common man, the oppressive sense of helplessness under the domination of a few, which are overshadowing our whole economic life." TNEC Report at 15.

IV. The present case raises important and unsettled questions relating to the reach of the antitrust laws.

When under the Interstate Commerce Act, certain common carrier mergers approved by the I.C.C. were exempt from the antitrust laws (49 U.S.C. sec. 5 (b) (9)), it was recognized by Congress that the employees would be injured. (Hearings before the Committee on Interstate Commerce, United States Senate on S. 1310 and S. 2016, 76th Cong., 1st Sess. 387 (remarks of Tom M'Grath, 1939); H. Rept. 1217, Transportation Act of 1939, 76th Cong., 1st Sess. 12 (1939).) It was noted in the debates that 80% of the savings affected by consolidation was taken out of the pockets of railroad workers. 84 Cong. Rec. 9883 (1939).

The House passed the Harrington Amendment to protect these employees:

> "Provided, however, that no such transaction shall be approved by the Commission if such transaction will result in unemployment or displacement of employees of the carrier or carriers, or in the impairment of existing employment rights of said employees." 84 Cong. Rec. 9881 (1939);

In conference, the Harrington Amendment was substituted by the present wording of the employee statutory protection. H. Rept. No. 2832, Conference Report on Transportation Act of 1940, 76th Cong. 3rd Sess. 68-69 (1940).

Section 5(2) (f) of the Interstate Commerce Act imposes upon the Commission a positive duty to protect the

interest of the railroad employees affected. *Norfolk and Western Railway Company* v. *Nemitz*, 92 S.Ct. 185 (1971). The statute provides that:

> "In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment. . . ." (49 U.S.C. sec. 5 (2) (f)).

Following this statutory mandate, the Commission withheld approval of the agreement between Great Northern and Northern Pacific until the 5,200 employees scheduled to be terminated had received "guarantees and job assurances for the rest of their working lives." Motion to affirm filed by I.C.C. at p. 7, *United States* v. *I.C.C.*, 396 U.S. 491 (1970).

The question that this Court must decide is: *Would Congress provide explicit protection to employees affected by a legal merger, and deny protection to all other American workers who are displaced or affected by an illegal merger*? It would appear reasonable to assume that Congress expected employees to be protected by the forces of free competition. The special protection for railroad employees was necessary because Congress reduced competition where railroads were concerned. Previously, the employees of the Great Northern and Northern Pacific had received protection through the preservation of free competition. *Northern Securities Co.* v. *United States*, 193 U.S. 197 (1904).

A related question that this Court must decide is whether employees are entitled to an open and unrestrained market. At common law, even an employee

terminable at will had a right to an "open market". *Huskie* v. *Griffin*, 75 N.H. 345, 74 Atl. 595, 596 (1909). ". . . one who interferes with this free market must justify his acts or respond in damages." *Id.* at 597. The Court in *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332, 335-336 (7th Cir. 1967) indicated that much the same was true under the antitrust laws. It stated that:

> ". . . agreements among supposed competitors not to employ each other's employees not only restrict freedom to enter into employment relationships, but may also . . . impair full and free competition in the supply of a service or commodity to the public." *Id.* at 335-336.

An open and unrestrained market is imperative to employees who must, according to the principles of the "work ethic", accept and follow the competitive directive. S. DeGrazia, The Political Community, A Study of Anomie, 51 (1948). The obligation to work is deep rooted in the make-up of men. Evolving from the religious teachings of Luther and Calvin, who preached that work was a form of serving God, a moral obligation to work was emplanted in man. A. Tilgher, Homo Faber, Work Through The Ages, 49, 58 (Trans. I. Fisher 1958). Idleness was "shunned as a deadly sin." *Id.* at 59.

With the Renaissance and the industrial revolution, work took on a new character: "the idea of work for its own sake". Tilgher, *supra* at 71. In a capitalistic society, it was only by work that man found his nobility and worth. "His whole code of ethics is contained in one precept, 'work'!" *Id.* at 134. An American without a job is a misfit. "To hold a job means to have status, to belong in the way of life." *Id.* at 46. In fact, as one writer notes: "Work itself keeps a man 'normal'." E. Bakke, Citizens Without Work, 248 (1940).

Man not only has a deep moral obligation to work, there are legal obligations that require him to work. Adriano Tilgher, recording the history of labor, observed that work is its own reward, and that because man ought to live by his own works, "*the state has a right to insist that everyone do work as much as he can.*" A. Tilgher, *supra* at 93-94 (Emphasis added). The laws of the State of Oklahoma offer an example of what Tilgher was saying. In Section 3 of Title 32, Oklahoma Statutes, 1971, it is provided:

> "The husband must support himself and his wife out of the community property or out of his separate property *or by his labor.*" (Emphasis added).

And at Title 10 Oklahoma Statutes 1971, sec. 12, it is provided:

> "It is the duty of the father and the mother of any poor person *who is unable to maintain himself by work,* to maintain such person to the extent of their ability." (Emphasis added).

Society does not assume the primary responsibility for the economic support of its people. To insure this support, the state exercises its right to insist that people work. From childhood, we have been taught that "the poor are poor because by being idle or unemployed they violate the competitive directive." S. DeGrazia, *supra* at 51. We are slow to feed the poor because of the deep belief that everyone ought to live by his own works. But how can man be obligated to work and support his family if corporations are allowed to violate the antitrust laws and in the process destroy thousands of jobs?

Congressman Kelley, in the Clayton Act debates, declared that big business through its "art of trickery and debauchery" has brazenly defied the spirit of the laws

made to protect the public. 51 Cong. Rec. 9087 (1914). He saw no room for compromise, and called for a halt to the "evils which have brought concentration of wealth and diffusion of poverty." 51 Cong. Rec. 9087 (1914). People stay out of poverty by working; however, jobs, in the United States, are produced only through free competition.

Adriano Tilgher, who recognized that, under the work ethic, the state has a right to insist that everyone work, also observed that:

> *"The state has the corresponding duty to assure to all its citizens the right to work."* A. Tilgher, *supra* at 94 (Emphasis added).

This obligation is satisfied by the state by keeping unrestrained the forces of free competition. Congress called for a halt to corporate mergers and the resulting increases in economic concentration in an effort to preserve an open market for employees. As stated in the TNEC Report at 6:

> "It is the fundamental duty of every society . . . to leave nothing undone to preserve and guarantee the opportunity to work to every capable and willing man."

By denying access to the courts to employees in this present case, the lower court has created a jurisprudential aberration. Man is still required, morally and legally, to work; however, he is denied the right to protect his job against the attack of corporations that defy the antitrust laws. This Court must decide if the antitrust laws offer any protection to employees.

V. Issues in this case are important to a substantial segment of American Society.

Rejecting the *parens patriae* suit in *Hawaii* v. *Standard Oil Company of California*, 405 U.S. 251, 265 (1972), this Court stated that: "Private citizens are not as powerless . . . as the State suggests." Private citizens, in order to enhance the efficacy of private actions, were advised to "combine their limited resources to achieve a more powerful litigation posture." *Hawaii, supra* at 266. The petitioners in these cases followed this course which is the only effective way to challenge multi-billion dollar aggregations of capital.

The issues in this case do not involve only a single employee; all the employees included in the class are affected. All working and unemployed Americans will be equally affected by the decision in this case. Because competition is the economic regulator, jobs and job opportunities are produced and preserved through the forces of free competition. Corporate mergers are now the most serious threat to these competitive forces. Today, unemployment and poverty pervades this Country principally because of the erosion of competition through the continuing merger trend.

There will be many more corporate mergers in the future; and consequently many more employees terminated. More people will be cast into poverty and those born in poverty or to be born in poverty will find it harder to escape. Only through jobs and work can a person escape the pain of poverty and the indignity of welfare. When left unrestrained by illegal corporate mergers, competition will produce jobs.

Corporate mergers will continue in the future because it costs a corporation nothing to violate Section 7 of the

Clayton Act. Since the Clayton Act carries no criminal sanction, corporations are willing to take their chances with the Government. Even if their merger is challenged by the Government, the corporation can reap enormous windfall profits principally at the expense of the employees. The lower court in this case has now created a legal sanction for this practice. It stated that the termination of employment "is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency." (Appendix A, p. A11).

This Court has done much in defining the personal rights and liberties of the people of America. What good is this cherished liberty, guarded so vigilantly by this Court, when giant corporations are permitted, for the sake of higher profits, to destroy jobs and therefore our economic freedom?

What good are personal rights and liberties when the citizens of this Country are committed to economic slavery "from aggregations of capital in the hands of a few individuals and corporations controlling, for their own profit and advantage exclusively, the entire business of the Country, including the production and sale of the necessaries of life." *Standard Oil Co.* v. *United States*, 221 U.S. 1, 83 (1911) (concurring and dissenting opinion of Mr. Justice Harlan).

Employees could organize into large nationwide unions for some protection against the great concentration of economic power in the hands of a few corporations. Congress, however, in passing the Celler-Kefauver Act, expressed opposition to this alternative. H.R. Rep. 1191, 81st Cong., 1st Sess. 13 (1949). It opposed both kinds of concentrated power in the hands of private persons, because such would necessarily lead "to big bureaus in the Government to deal with them." H.R. Rep. 1191, 81st

Cong., 1st Sess. 13 (1949). The Congressional purpose was for jobs to be produced and employees protected by the forces of free competition.

Corporations with their enormous economic power have, however, been allowed to destroy the forces of free competition and escape the penalty of the law. Denying access to the courts to employees for the purpose of defending the competition upon which they still must rely for jobs, corporations have completed their evolution. Large national corporations have long become more powerful than states. "[L]ocal communities and States are no longer economically self sufficient, but are dependent for their commercial and industrial life upon the acts and decisions of persons and organizations beyond their jurisdiction." TNEC Report, *supra* at 5. See also, *Northern Securities Co.* v. *United States,* 193 U.S. 197, 327-328 (1904).

Corporations, with the lower court's opinion, have now gained an advantage over the National government. With access to the courts closed to employees, corporations are free to violate the antitrust laws and engage in wholesale termination of employees, eliminating thereby much of the accumulated retirement benefits. Government and government agencies do not enjoy the same freedom to arbitrarily destroy the rights of people. *Flast* v. *Cohen,* 392 U.S. 83 (1968); *Association of Data Processing Service Organization, Inc.* v. *Camp.,* 397 U.S. 150 (1970); *Barlow* v. *Collins,* 397 U.S. 159 (1970); *Sierra Club* v. *Morton,* 405 U.S. 727 (1972).

Congress has taken the position that corporations are not to be allowed to do that which government cannot do. "If the political structure is designed to preserve the freedom of the individual, the economic structure must not be permitted to destroy it." TNEC Report, *supra* at 5.

Economic organizations are "called into existence by men to meet their material needs"; they are therefore "justified only to the degree in which they serve the entire community." *Id.* "Like government organization, business organization has no right or function to control the activities and the lives of men." *Id.*

The evolution of corporations was completed with the opinion of the Tenth Circuit issued in this case. With this decision, corporations are permitted to dominate the lives of people. Unless the lower court opinion is set aside, the people of this Country must submit their lives to the will of the economic corporate giants.

When a poor man steals a loaf of bread because he is hungry, he is vigorously prosecuted and sent to jail. Corporations that show contempt for the law must be prosecuted with equal vigor if we are to endure as a legal society. Based on the lower court's opinion, corporations can ignore with impunity the very laws designed to protect employees. These employees and other little people, not needed by these merging corporations, have been left to be trampled under at the will of a few select and economically powerful men.

Congress observed that the monopolist that takes away a man's job takes away his life. TNEC Report, *supra* at 6. When courts sanction this travesty by closing their doors to employees, the personal suffering becomes intolerable. As the poor man is prosecuted for violating the law, corporations that violate the antitrust laws must be prosecuted. Where illegal corporate mergers are involved the only effective prosecution is the private antitrust suit.

The criminal sanction was deleted from the Clayton Act by Congress in an effort to avoid the strict construction rule attached to penal statutes. There was some ob-

jection to this deletion; however, the private treble damage relief provided was considered to be more effective than the criminal prosecution. 51 Cong. Rec. 16319 (1914) (remarks of Congressman Floyd).

The lower court has made a tragic mistake that can now be corrected only by this Court.

CONCLUSION

For all the above reasons, this writ should be granted and the judgments of the Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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918—932-4661
Attorney for Petitioners

APPENDIX A

United States Court of Appeals
Tenth Circuit
Office of the Clerk
Denver, Colorado 80202

January 8, 1973

Howard K. Phillips
Clerk

Telephone
303-837-3157

Stan P. Doyle, Esquire
Attorney at Law
P. O. Box 4470
Tulsa, Oklahoma 74104

Re: No. 72-1283, Delbert C. Reibert, etc. v.
Atlantic Richfield Company,
et al.

Dear Mr. Doyle:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Very truly yours,

Howard K. Phillips, Clerk
By: /s/ Lavon M. Irlbeck
Lavon M. Irlbeck,
Deputy Clerk

/li
Enclosure

cc: Joseph W. Morris, Esquire, Attorney at Law, P. O. Box 2040, Tulsa, Oklahoma 74102

Otis Pratt Pearsall, Esquire, Attorney at Law, One Wall Street, New York, New York 10005

Donald A. Bright, Esquire, Legal Department, Atlantic Richfield Co., 717 Fifth Avenue, New York, New York

Richard B. McDermott and D. E. Hammer, Esquires, Attorneys at Law, 1300 National Bank of Tulsa Building, Tulsa, Oklahoma 74103

William E. Jackson, Esquire, Milbank, Tweed, Radley and McCloy, One Chase Manhattan Plaza, New York, New York.

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY, 1973, TERM

No. 72-1283

DELBERT C. REIBERT, individually and on behalf of employees of the previously existing Sinclair Oil Corporation, the employees of Atlantic Richfield Company and employment agencies who provided temporary help for each corporation,
Plaintiffs-Appellants,

v.

ATLANTIC RICHFIELD COMPANY and SINCLAIR OIL CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(District Court No. 69-C-233)

(Filed January 8, 1973)

Stan P. Doyle, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Otis Pratt Pearsall, New York, New York (Richard B. McDermott and Donald E. Hammer, Tulsa, Oklahoma; Jerome G. Shapiro, John A. Donovan and Donald A. Bright, New York, New York, on the brief), for Defendants-Appellees.

Before PHILLIPS, HILL and HOLLOWAY, United States Circuit Judges.

HILL, Circuit Judge.

This is an appeal from an order by the United States District Court for the Northern District of Oklahoma

granting defendants-appellees summary judgment on their motion to dismiss plaintiffs-appellants' suit for violations of Sherman 1 (15 U.S.C. § 1) and Clayton 7 (15 U.S.C. § 18).

Appellant Reibert had been employed by Sinclair since 1952. Originally employed as a draftsman, he subsequently held various jobs and was working as a research technician at the time of his termination. The circumstances surrounding his discharge began when Atlantic Richfield Company and Sinclair reached a preliminary agreement to merge. Approval by the boards of directors was forthcoming, and finally adoption by the stockholders.

The merger was temporarily halted when the Department of Justice commenced an action against Atlantic and Sinclair in the United States District Court for the Southern District of New York challenging the merger under Section 7 of the Clayton Act. The complaint charged the merger might substantially lessen competition or create a monopoly in the selling of gas in four geographic regions. Ultimately Sinclair was forced to divest itself of all marketing properties in the northeastern and southeastern states.

Once the court accepted Sinclair's divestiture, the merger was consummated. Shortly thereafter, Reibert was discharged. No evidence has been submitted intimating that appellant's discharge was for any reason other than the duplication in jobs occasioned by the merger. The merger's reverberations caused 4000 employees to be terminated or forced into early retirement within one year of consolidation. Appellant filed this class action on behalf of all employees and the employment agencies which regularly had provided temporary help to Atlantic Richfield and Sinclair.

Appellant alleges, inter alia, that Atlantic and Sinclair entered into a mutual merger agreement which is in restraint of trade, in violation of Section 1 of the Sherman Act. Atlantic's acquisition of Sinclair also violated Section 7 of the Clayton Act in that it might substantially lessen competition or tend to create a monopoly in the petroleum industry. Treble damages were sought under Section 4 of the Clayton Act (15 U.S.C. § 15) and injunctive relief under Section 16 (15 U.S.C. § 26) of the same Act.

On December 1, 1969, appellant filed a motion for summary judgment seeking to dispose of certain legal issues, including standing of employees to sue. The trial judge denied this motion. Atlantic subsequently filed a motion for summary judgment on the issue of standing which was sustained on grounds that: (1) appellant's injury, if any, was too indirect to be actionable under Clayton 4; and (2) appellant was not injured in his business or property by anything forbidden by antitrust laws.

Numerous issues were raised by appellant on appeal, but our decision that he lacks standing is dispositive; therefore no attempt will be made to answer the other issues.

Appellant asserts that employees have standing to sue whenever the effect of an illegal merger is to injure them. The issue boils down to whether or not antitrust laws are directed toward employees injured by an alleged illegal merger.[1]

---

1. Clayton 4 provides: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore . . . and shall recover threefold the damages by him sustained. . . ." Clayton 16 provides: "Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws. . . ."

"Directness of injury" has been a phrase confronting the courts on numerous occasions. For example, our own court, in Nationwide Auto Appraiser Service Co. v. Association of C. & S. Co., 382 F.2d 925 (10th Cir. 1967), determined that a franchiser complaining of an antitrust combination directed at its franchisee suffered only "indirect" or "remote" damages. *See also* Billy Baxter, Inc. v. Coca-Cola Co., 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923. A non-operating landlord of theaters allegedly used by its tenant and various motion picture distributors and exhibitors in furtherance of an antitrust conspiracy to restrain the trade of competing distributors and exhibitors has been denied standing for failure to come within the "target area" of the alleged conspiracy. Calderone Enter. Corp. v. United States Theatre Circuit, 454 F.2d 1292 (2d Cir. 1971). Standing has been denied a patent owner charging derivative harm from a conspiracy directed against its licensees. Productive Inventions, Inc. v. Trico Products Corp., 224 F.2d 678 (2d Cir. 1955), *cert. denied*, 350 U.S. 936 (1956). Stockholders of a corporation are not within the protected area merely because an unlawful conspiracy has caused injury to the corporation. Campo v. National Football League, 334 F.Supp. 1181 (E. D. La. 1971); Ash v. International Business Machines, Inc., 353 F.2d 491 (3d Cir. 1965); Former Stockholders of Barr Rubber Products Co. v. McNeil Corp., 325 F.Supp. 917 (N.D. Ohio 1970), *aff'd mem.*, 441 F.2d 1169 (6th Cir. 1971). Neither is a creditor suing to recover damages to his debtor's business within the antitrust laws' area of protection. Walder v. Paramount Publix Corp., 132 F.Supp. 912 (S.D.N.Y. 1955).

Standing to sue by employees presents yet another class seeking relief under Clayton 4 and 16. Appellant contends he satisfies the directness test propounded in Nationwide Auto Appraiser Serv. v. Association of C. &

S. Co., supra. He was employed by Sinclair for 17 years. He was not fired because of inability to handle the job, but as a result of an unlawful merger. For every wrong there should be a remedy; Clayton 4 and 16 provide this remedy to employees discharged by an alleged illicit merger.

Appellant states that employees have standing because employment is business or property as defined in Clayton 4. Supporting this assertion he cites Hawaii v. Standard Oil Company of California, ... U.S. .... (1972). This case concerns the state's right to sue a party for antitrust violations under the *parens patriae* theory. Although the Supreme Court holds that Section 4 of the Clayton Act does not authorize a state to sue for injury to its general economy resulting from alleged antitrust violations, the Court approves a definition of "business or property" enunciated in Roseland v. Phister Manufacturing Co., 125 F.2d 417 (7th Cir. 1942). Business or property is defined in Roseland as "employment or occupation in which a person is engaged to procure a living." Roseland v. Phister Mfg. Co., supra at 419.

Roseland concerns antitrust violations by three corporations engaged in manufacturing and selling fire prevention equipment and fire extinguishers. Plaintiff was a salesman for one of the defendant companies working on a commission basis. The three defendant companies combined their activities for the purpose of, inter alia, suppressing competition in interstate commerce, conspiring to monopolize the commerce, eliminating fair and lawful competition, and dividing customers and purchasers. Plaintiff was accorded standing because his work was that of a sales agent possessing an exclusive territory of several states with an established clientele. Such employees fall within the definition of business or property. More recent cases supporting this view include Daily v. Quality

School Plan, Inc. 380 F.2d 484 (5th Cir. 1967) (area supervisor of magazine subscription company injured in his business or property by a prohibited corporate acquisition); and Nichols v. Spencer International Press, Inc., 371 F.2d 332 (7th Cir. 1967) (no-switching agreement by which each publisher agrees not to employ a former employee of the other until six months after termination of former employment constitutes injury to employee in his business or property).

We are not in disagreement with the above cited cases; however, we do not believe they are applicable to the situation here. The Supreme Court in Hawaii was concerned with the state's standing to sue for injuries to its general economy resulting from antitrust violations. Although approving the standing definition in Roseland, we do not feel the Court expanded the definition to include situations factually different from that in Roseland. In both Roseland, supra, and Dailey, supra, the employees worked on a commission basis. They in essence were quasi-businessmen operating in a market carved out by their own aggressiveness and salesmanship qualities. Thus when their employers engaged in anti-competitive practices, the employees were directly injured by these violations.

For appellant to satisfy the business or property prerequisite, he must demonstrate that his job is a commercial venture or enterprise. Broadcasters, Inc. v. Morristown Broadcasting Corp., 185 F.Supp. 641, 644 (D.C.N.J. 1960); *see also* Peller v. International Boxing Club, 227 F.2d 593 (7th Cir. 1955); Brownlee v. Malco Theaters, 99 F.Supp. 312 (W.D.Ark. 1951). Appellant did not operate out of a specific market nor did his job compel establishing a clientele. In no way could his job be construed as a venture or enterprise within the market area endangered by the merger.

Appellant asserts that standing has been granted employees in numerous cases. The Nichols v. Spencer International Press, Inc., supra, case allowed an employee standing to attack anti-competitive practices by his employers. In Radovich v. National Football League, 352 U.S. 445 (1957), plaintiff sued for treble damages and injunctive relief under Clayton 4. Plaintiff contended there was a conspiracy by the National Football League, the effect of which was to prevent his employment in organized football. The Supreme Court determined that if plaintiff has suffered injury and satisfies the test under the Sherman Act's general prohibiton of unreasonable restraints of trade, then his pleadings are sufficient to satisfy the jurisdictional requisites. *See also* Flood v. Kuhn, 443 F.2d 264 (2d Cir. 1971), *aff'd* ..... U.S. ..... (1972). Once again these cases are inapposite. Each case alleges antitrust violations directed against the blackballed party. Appellant Reibert is not faced with a similar problem. If there is any antitrust violation, it is directed toward the petroleum industry. Appellant is not among those (the buyers and sellers constituting the market) engaged in the sort of legitimate activities which the prohibition of this type of violation was clearly intended to protect. Billy Baxter, Inc. v. Coca-Cola Co., supra.

Antitrust violations admittedly create foreseeable ripples of injury to individual stockholders, consumers and employees, but the law has not allowed all of these standing to sue for treble damages. Billy Baxter v. Coca-Cola Co., supra. The aggrieved party must satisfy the "by reason of" and/or "by" requirements found in Sections 4 and 16 of the Clayton Act, respectively. This prerequisite boils down to complainant proving that the antitrust violations are the proximate cause of his injury. Two elements are necessary to demonstrate proximate

cause: (1) there is a causal connection between an antitrust violation and an injury sufficient to establish the violation as a substantial factor in the occurrence of damage; and (2) that the illegal act is linked to a plaintiff engaged in activities intended to be protected by the antitrust laws. Billy Baxter, Inc. v. Coca-Cola Co., supra. Appellant fails to satisfy either requirement. The first element, causal connection between violation and injury, is lacking because appellant cannot show that any antitrust violations directly injured him. He has suffered no direct injury as a result of the prohibited lessening of competition. Conference of Studio Unions v. Lowe's, Inc., 193 F.2d 51 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); Peterson v. Borden Co., 50 F.2d 644 (7th Cir. 1931); Rayco Mfg. Co. v. Dunn, 234 F.Supp. 593 (N.D.Ill. 1964). In Peterson v. Borden Co., supra, stockholders were allegedly fraudulently induced to sell their stocks to majority stockholders for less than its value. Subsequently the majority stockholders sold the entire assets to a corporate competitor. The minority stockholders sued to recover damages for injury to their property caused by alleged violations of the antitrust laws resulting from the sale of stock by majority stockholders to a competitor. The court denied recovery because a stockholder of an absorbed corporation who parts with his stock for less than its actual cash value cannot attribute his loss to substantial lessening of competition or creation of a monopoly. Any injury sustained is through fraud by majority stockholders, not lessening of competition.

In another case concerning the causal relationship between antitrust violations and injury, a franchisee sued B. F. Goodrich for acquiring all of franchiser's stock, thereby creating a monopoly in violation of Section 7 of the Clayton Act. Franchisee alleged that by the illegal

acquisition, he was prevented from purchasing merchandise from competing suppliers. The court denied him standing because he was unable to relate the injury to a lessening of competition or monopoly. Although a competitor of the acquiring or acquired corporation might have standing to bring such an action, the franchisee was neither foreclosed from selling to the franchiser nor was he a customer foreclosed from receiving an adequate supply of merchandise. Rayco Mfg. Co. v. Dunn, supra.

Appellant in the instant case is confronted with the same problem. If there has been a wrong, appellant cannot show that it results from the lessening of competition. Termination of employment will often occur whether a merger is legal or illegal. It is the natural effect flowing from two similarly structured businesses combining their assets to maximize efficiency. As was summed up in Conference of Studio Unions v. Loew's Inc., supra, "the loss of their rights of employment is not a result of any lessening of commercial competition. . . ." *See also* Schatte v. International Alliance of Theatrical Stage Employees, 182 F.2d 158 (9th Cir. 1950).

Salaried employees stand on no better grounds with the second proximate cause requirement since they are not within the area of competitive economy protected against unlawful mergers. In Conference of Studio Unions v. Lowe's, Inc., supra, employees sought treble damages and injunctive relief on the theory they had lost employment as a result of a conspiracy in restraint of trade in which their employers participated. The defendants were major motion picture studios who were attempting to drive independent motion picture studios out of business. The court determined that employees must show that more than one purpose of the conspiracy was a restraint of trade, and that an act was committed which harms them. They

must show they are "within that area of the economy which is endangered by a breakdown of competitive conditions in a particular industry." *Id.*, 55.

Our court had occasion to determine the proximity necessary for standing to sue in Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., supra. Appellant corporation in that case was organized to sell exclusive territorial franchises to independent businessmen engaged in appraising automobile damage. This corporation provided its franchise holders with business advice and advertising. The appellees were associations whose members were insurance companies. Appellant argued the appellees influenced their members to sponsor one appraiser to handle all their appraisal business. The result was alleged to be an unreasonable restraint on trade resulting in substantial injury to appellant and its franchisees. The court held appellant's damages resulting from defendants' acts were too remote or indirect to allow recovery.

Appellant Reibert's injuries were also too indirect to allow standing. The Sherman Act was enacted to prevent restraint of trade having a significant effect on "business competition." Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940). The Supreme Court felt Section 7, as amended by the Celler-Kefauver bill in 1950, also was enacted to protect competition. Brown Shoe Co. v. United States, 370 U.S. 294, 320 (1962). Appellant's termination of employment does not affect the area legislatively protected. At best, appellant's discharge was no more than an outgrowth of the alleged unlawful merger. He has failed to show the necessary directness of injury caused by the illicit acts. Appellant is not in the area of economy endangered by a breakdown of competitive conditions, and thus lacks standing to sue

Appellants cite Wilson v. Ringsby Truck Lines, Inc., 320 F.Supp. 699 (D.C.Colo. 1970), as authority. This case appears to be in point. Defendant Ringsby was a common carrier transporting goods in Colorado and Wyoming. Plaintiffs were employees of Ringsby who worked as truck drivers and warehousemen. Plaintiffs alleged defendant Ringsby and other common carriers illegally conspired to divide up and control the business between Colorado and Wyoming. The result caused a reduction in wages and other compensation to plaintiffs. Defendant argued, inter alia, lack of standing by plaintiffs-employees. This motion was denied. The trial court's reasoning stemmed from the Clayton 4 language itself: "*Any* person who shall be injured in his business or property. . . ." (Emphasis added). Pointing to the confusion arising from the various interpretations of Clayton 4, the trial court determined the statute's best interpretation was a liberal one. The court distinguished Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., supra, by viewing the special relationships between the parties. In Nationwide, plaintiff-franchiser was incidentally affected by defendants' attack against franchise holders. In Wilson, the contractual relationship between employer and employee is as proximate as that found in landlord-tenant cases, in which standing has been upheld. *E.g.*, Congress Building Corp. v. Loew's, Inc., 246 F.2d 587 (7th Cir. 1957). With all due respect to the trial court's position, we do not feel the weight of authority is on his side. *See* Billy Baxter, Inc. v. Coca-Cola Co., supra; Calderone Enter. Corp. v. United Artists Theatre Cir., supra; Centanni v. T. Smith & Sons, Inc., 216 F.Supp. 330 (E.D.La. 1963), *aff'd* 323 F.2d 323 (5th Cir.); Conference of Studio Unions v. Loew's, Inc. supra; Martens v. Barrett, 245 F.2d 844 (5th Cir. 1957); Westmoreland Asbestos Co. v. Johns-Manville Corp., 30

F.Supp. 389 (S.D.N.Y. 1939), *aff'd mem.*, 113 F.2d 114 (2d Cir. 1940); Loeb v. Eastman Kodak Co., 183 F. 704 (3d Cir. 1910); Gerli v. Silk Ass'n of America, 36 F.2d 959 (S.D.N.Y. 1929); Corey v. Boston Ice Co., 207 F. 465 (D.C. Mass. 1913); Deaktor v. Fox Grocery Co., 332 F.Supp. 536 (W.D.Pa. 1971); Sargent v. National Broadcasting Co., 136 F.Supp. 560 (N.D.Cal. 1955); Walder v. Paramount Publix Corp., supra.

As our court has stated, the "directness rule" appears to be a practical application of the Clayton Act. If the test is outmoded, Congress would have so indicated. In view of the lapse of time without legislative changes, we must assume the rule accords with the intent of Congress. Nationwide Auto Appraiser Serv. v. Association of C. & S. Co., supra.

Affirmed.

APPENDIX B

REIBERT ET. AL. v. ATLANTIC RICHFIELD ET. AL.

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE

(Filed March 20, 1972)

This matter comes on for hearing on this 8th day of December, 1971, before the undersigned Magistrate. The plaintiff appeared by his attorney, Stan P. Doyle, and the defendants appeared by their attorneys, R. B. McDermott, D. E. Hammer and Donald Bright. Upon the various pending motions the Magistrate makes and enters the following findings:

1. In view of the finding and recommendation hereinafter made with respect to defendants' motion for summary judgment, the plaintiff's motion for determination of a class action should be overruled, and certification of a class in this action should be denied.

2. The plaintiff's motion for a pretrial conference with the presence of the court should be, under the current rules of this court, overruled.

3. The plaintiff's motion for an order compelling defendants to complete and serve answers to interrogatories should be passed pending a determination of the several pending motions for summary judgment by plaintiff and by defendants.

4. Plaintiff's renewal of his motion for partial summary judgment, previously denied in this action, should again be denied for that no per se violation of the anti-trust laws has been shown upon undisputed

facts made manifest by the pleadings and affidavits. Accordingly, the said motion should again be overruled.

5. Upon the motion of the defendants for summary judgment the Magistrate finds upon undisputed facts as reflected by the pleadings, preceding discovery, and the affidavits of the parties:

(a) Plaintiff was a salaried employee of the defendant, Sinclair Oil Corporation, who continued briefly in the employ of the merged corporations following their merger, under contract of employment terminable at the will of either employer or employee.

(b) Plaintiff had no other interest or concern in the business of Sinclair Oil Corporation or Atlantic Richfield Company than his employment for personal services.

(c) Plaintiff's employment was unrelated to any of the business operations of the defendants alleged in the complaint to have been restrained by any violation of the anti-trust laws.

(d) Plaintiff was not employed in any activity upon behalf of the defendants or either of them which was within the target area of any restraint alleged in the complaint.

(e) Plaintiff was not injured in his business or property by anything forbidden by the anti-trust laws.

(f) Plaintiff's injury, if any, was indirect, incidental, derivative and remote, and therefore not actionable under Sec. 4 of the Clayton Act (15 U.S.C. 15).

(g) In view of the preceding findings, defendants' motion for summary judgment should be sustained upon the authority of Nationwide Auto Appraiser Service, Inc. v. Association of Casualty and Surety Cos., 382 F.2d 925 (10th Cir. 1967); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (CA-9) cert. den. 342 U.S. 919 (1952); Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (CA-2 1970) cert. den. 401 U.S. 923 (1971); Mans v. Sunray DX Oil Co., No. 70-C-140, USDC-ND-Okla. (May 20, 1971); Contreras v. Grower Shipper Vegetable Assn., 1971 Trade Cases, paragraph 73,592 (ND-Calif. 1971); Bywater, et al v. Matshushita Elec. Ind. Co., Ltd, et al, 1971 Trade Cases, paragraph 73,759, and other cases cited in defendants' briefs.

(h) In view of the finding that plaintiff has no standing to sue upon the claims asserted, he has no capacity to represent others who might or might not have claims in the pleaded premises.

IT IS, THEREFORE, RECOMMENDED BY THE MAGISTRATE THAT:

1. Plaintiff's motion for determination of a class should be overruled and certification of a class should be denied.

2. Plaintiff's motion for a pretrial conference with the court should be overruled and denied.

3. Plaintiff's motion for summary judgment or partial summary judgment should again be overruled and denied.

4. The defendants' motion for summary judgment should be sustained and granted and judgment should enter for the defendants.

FILED AND ENTERED this 20 day of March, 1972.

/s/ Morris L. Bradford
Magistrate

Form Approved:

/s/ Stan P. Doyle
For the Plaintiff

/s/ R. B. McDermott
For the Defendants

APPENDIX C

REIBERT ET. AL. v. ATLANTIC RICHFIELD ET. AL.

ORDER

(Filed March 30, 1972)

After reviewing the file and record in this case, I approve the findings and recommendations of the Magistrate.

IT IS SO ORDERED.

The Clerk of the Court shall forward by mail a copy of this Order to each of the attorneys for the above named plaintiff and defendants.

Dated this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

JUDGMENT

(Filed March 20, 1972)

This action came on for consideration before the Court, Honorable Allen E. Barrow, Chief District Judge, presiding, and the Motion for Summary Judgment by the plaintiff having been denied, and the Motion for Summary Judgment by the defendants having been sustained and a decision having been duly rendered,

IT IS ORDERED AND ADJUDGED

That the plaintiff take nothing on his complaint, that this action is dismissed on the merits and that the defend-

ants, Atlantic Richfield Company and Sinclair Oil Corporation, recover of the plaintiff, Delbert C. Reibert, their costs of action.

Dated at Tulsa, Oklahoma this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

Form Approved:

/s/ Stan P. Doyle
For the Plaintiff

/s/ D. E. Hammer
For the Defendants

APPENDIX D

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

JANUARY, 1973, TERM

No. 71-1410

KEN F. MANS, individually and on behalf of all persons employed by Sunray DX Oil Company and Sun Oil Company as of the date of merger of these two companies,
Plaintiffs-Appellants,

v.

SUNRAY DX OIL COMPANY and SUN OIL COMPANY,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(D. C. No. 70-C-140)

(Filed January 17, 1973)

Stan P. Doyle, Tulsa, Oklahoma, for Plaintiffs-Appellants

Peter H. Holme, Jr., Denver, Colorado (Holme, Roberts and Owen, Denver, Colorado and Pepper, Hamilton & Sheetz, and John G. Harkins, Jr., and Barbara W. Mather, Philadelphia, Pennsylvania, were on the brief) for Defendants-Appellees

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Before HILL, HOLLOWAY and McWILLIAMS,
Circuit Judges

PER CURIAM

Appellant Mans brought this antitrust suit on behalf of himself and others similarly situated, alleging the unlawfulness of a merger between appellees Sunray DX Oil Company and Sun Oil Company under § 1 of the Sherman Act (15 U.S.C.A. § 1) and § 7 of the Clayton Act (15 U.S.C.A. § 18). Treble damages and injunctive relief were sought under §§ 4 and 16 of the Clayton Act, respectively (15 U.S.C.A. §§ 15 and 26). Mans claimed that he lost his salaried position as a sales manager of various Sunray products as a consequence of the allegedly illegal merger.

The trial court granted summary judgment in favor of Sunray and Sun on the ground that Mans lacked standing to sue. The court concluded that Mans' employment was not within the target area of the allegedly anticompetitive result of the merger. And assuming, but not deciding, that such employment was a property right within the meaning of the statute, the court concluded also that the undisputed facts did not establish that termination of Mans' employment was the direct and proximate result of the merger as a matter of law. The court pointed out that Mans stated he could have continued in employment had he transferred to Dallas, and concluded that Mans' desire to remain in employment in Tulsa was the proximate cause of the termination of employment as a matter of law. For reasons stated below we sustain the trial court's decision on lack of standing to sue and affirm the judgment.

In Reibert v. Atlantic Richfield Company and Sinclair Oil Corp., ... F.2d ....., (10th Cir., filed January 8, 1973), we recently held that a salaried employee lacked standing in a similar suit challenging the lawfulness of a merger under the same provisions of the antitrust laws.

This court held that the employee Reibert failed to satisfy the requirement of § 4 of the Clayton Act for injury to business or property, pointing out that Reibert did not operate out of a specific market and did not have a job compelling the establishment of a clientele. The court also held that requirements under both §§ 4 and 16 of the Clayton Act as to proximate cause were not satisfied. Proximate cause was lacking since there was no causal connection between the alleged antitrust violation and the injury claimed, and the plaintiff employee was not engaged in activities in the area of the competitive economy protected by these statutes.

Our record shows that Mans was a salaried employee earning $1,360 per month just prior to termination of his employment. His salary made up his entire compensation as an employee, and he received no commissions, bonuses or other income from the company. He was the manager of compounder-blender sales, charged with a sales function for these products. He traveled somewhat less than half of the time, covering basically the mid-continent area with frequent trips to several cities in that area and occasional trips elsewhere. However in his job of selling he was not limited in geographic scope.

Under *Reibert* we must conclude that, as a salaried employee in the position he held, appellant Mans lacked standing to sue under §§ 4 and 16 of the Clayton Act. Without deciding the correctness of the trial court's conclusion that appellant's desire as to his place of employment was the proximate cause of the termination of his employment, we nevertheless hold that appellant lacked standing to sue in view of the circumstances of his employment and the *Reibert* decision. Accordingly the judgment is affirmed.

APPENDIX E

MANS ET AL. v. SUNRAY D-X OIL CO. ET AL.

ORDER

(Filed May 20, 1971)

Plaintiff proceeds in this case alleging the existence of a class of persons of which he claims to be representative, seeking relief in the form of damages and injunctions under 15 U.S.C.A. §§ 1, 15, 18, 22 and 26. Plaintiff's claims are as follows:

1. 15 U.S.C.A. § 1. Plaintiff claims that Defendants' agreement by which their merger was effected is a per se violation of this statute because it restrains trade by eliminating a potential employer, creating a division of markets and fixing prices.

2. 15 U.S.C.A. § 15. Plaintiff alleges that his right of employment is his business or property which is protected by this statute from direct injury by Defendants' alleged violations of the antitrust laws. The injury to his claimed business or property is stated to be his loss of employment by Sunray after the merger when Plaintiff refused to accept employment at a higher salary in another city.

3. 15 U.S.C.A. § 18. Plaintiff alleges that Defendants' merger substantially lessens competition and tends to create a monopoly, principally because of the concentration of economic power which resulted from the merger.

4. 15 U.S.C.A. § 22. Plaintiff claims, and Defendants do not dispute, that venue exists in the Northern District of Oklahoma.

5. 15 U.S.C.A. § 26. Plaintiff claims that injunctive relief in the form of divestiture is proper in order to put an end to the violations of the antitrust laws alleged to have occurred because such relief is the only method by which competition existing prior to the merger may be recaptured.

Both Plaintiff and Defendants have moved for summary judgment. Their Motions seek adjudication of the following issues, among others: (1) Whether Defendants' merger is a per se violation of 15 U.S.C.A. §§ 1 and 18, and (2) Whether Plaintiff has standing individually and as representative of the claimed class to maintain this action under 15 U.S.C.A. §§ 15 and 26.

Plaintiff alleges that he was employed by Sunray for a number of years. For the last fourteen years, Plaintiff was employed in Tulsa, Oklahoma selling tank car loads of refined oils to industrial consumers. After the Defendants' merger, Plaintiff was offered employment by the Defendants in Dallas, Texas at a greater salary than he was then earning in Tulsa. When Plaintiff refused to transfer to Dallas, his employment was terminated. Plaintiff alleges that the Defendants' action cost his retirement benefits which would have vested within three years and his salary for the three years. Plaintiff further alleges that Defendants refused to pay him severance benefits in the approximate amount of $21,000.[1] Defendants by Answer admit Plaintiff's employment and the offers of comparable employment in other cities but deny that they deprived him of three years' pay, retirement benefits or severance pay.

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1. The Court would parenthetically note that claims for unpaid compensation due an employee may not be asserted in an antitrust suit according to *Nichols* v. *Spencer International Press, Inc.*, 371 F. 2d 332 (Seventh Cir. 1967).

It is essential to Plaintiffs' case that a violation of the antitrust laws be shown. None of the parties dispute this principle. Thus, the first and perhaps paramount issue presented by the Plaintiffs' Motion is whether the merger constitutes, as Plaintiff claims, a per se violation of 15 U.S.C.A. §§ 1 and 18. It is Plaintiff's thesis in his briefs that mere bigness alone is a per se violation of these statutes. Plaintiff apparently recognizes that no court has so held for, after an interminable discussion of the legislative history, purpose and development of the antitrust laws, he urges this Court to make the "bold move" to establish this concept as decisional precedent, thus anticipating what he thinks the Supreme Court will surely do. Such a move by this Court would not only be "bold", it would also be unsupportable. This Court is disposed to follow the pronouncements of the Supreme Court, not predict them. The Supreme Court has said:

> "The law, however, does not make the mere size of a corporation, however impressive, or the existence of an unexerted power on its part, an offense, when unaccompanied by unlawful conduct in the exercise of its power. *United States* v. *United States Steel Corp.*, 251 U.S. 417, 451, 64 L. ed. 343, 353, 8 A.L.R. 1121, 40 Sup. Ct. Rep. 293." *United States* v. *International Harvester Co.*, 274 U.S. 693 at page 708, 71 L. ed. 1302 at page 1310, 47 Sup. Ct. 748 (1927).

The Court has found nothing in reported cases which would detract from such a clear pronouncement.[2] The plaintiff in *United States* v. *Manufacturers Hanover Trust Co.*, 240 F.Supp. 867 (NY 1965), also a merger case, urged this same contention, to which the district court responded in the following fashion:

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2. And the method used to achieve bigness through the vehicle of merger was attacked in *United States* v. *International Harvester Co., supra*, without success.

> "Arguments based on size, big or little, appeal not to reason or fairness but to emotion and prejudice. The government's [plaintiff's] cries may stir resonant chimes in some ears, but they strike a gong of alarm in ours. Daily experience in the trial court teaches that such pleas generally mask a meritless case and, if anything, compel an examination of the evidence with special scrutiny and cold objectivity lest our oath of office become a hollow mockery and equal justice for the rich and the poor alike an empty platitude. That is no doubt the premise underlying the rule that absolute size (wealth) standing alone proves nothing violative of the antitrust laws. Were this a jury trial we would be bound to give such an instruction, and surely we can do no less than observe the law ourselves." 240 F. Supp. 867 at page 928.

The cases cited by the court in footnote 165, 240 F. Supp. 867 at page 928 fully support its remarks. The combined size alone of the merged Defendants nor the method used to achieve such size are not enough to authorize summary judgment for Plaintiff.

Plaintiff's allegations of price fixing and division of markets, ordinarily per se violations of the antitrust laws, are unsupported by any factual assertions; they are mere legal conclusions. In addition, they are denied by Defendants and in any event must be considered as issues which if properly developed would contain material facts as to which there is a dispute among the parties. Summary judgment for Plaintiff cannot be predicated on his "bare bones" allegations of price fixing and division of markets and in no event where such allegations are denied by Answer.

The next question is Plaintiff's standing to sue. This is raised by Defendants and their contention that he has

no such standing is urged by them as ground for summary judgment. Plaintiff's substantive right of action, if any, is created by 15 U.S.C.A. §§ 15 and 26, the former statute allowing recovery of treble damages and the latter statute permitting injunctive relief. The issue of standing to sue generally depends on whether a Plaintiff from a causation standpoint has suffered a "direct" rather than an "incidental" injury as a result of some violation of the antitrust laws by a Defendant or whether the business or property of a Plaintiff is in the "target area" of a Defendant's unlawful act. *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (Second Cir. 1970). The latter proposition may be quickly dealt with for without a moment's hesitation it must be concluded that Plaintiff's employment with Defendant Sunray was not within the "target area" of the alleged anticompetitive result of the merger of the Defendants. It is undisputed that Plaintiff's employment was desired after the merger for he was offered three job opportunities all of which he rejected.

In attempting to analyze the great variety of language used by the Courts to describe a "direct" injury, Von Kalinowski concludes that:

> "Whatever these verbal diversities may be, what the courts have done is to formulate a test of *proximate cause, leaving for judicial determination in each case* whether a particular plaintiff should be barred as being only distantly hurt." 2 Von Kalinowski, Antitrust Laws and Trade Regulation § 11.04 [1][e], footnote 43, at page 11-32. (Emphasis supplied.)

Plaintiff contends that his injury is direct, in that the merger eliminated one possible employer from the market for his services. Defendants contend that the proximate and direct cause of Plaintiff's injury, if any, was his own choice not to transfer to another city, for which he was

terminated in that his services were no longer needed in Tulsa, the Plaintiff having no contract of employment for any period of time or for any place. Plaintiff opposes this contention stating that his services were no longer needed in Tulsa because of the merger and thus the merger was the direct and proximate cause of his injury.

Plaintiff's case is not like those involving blacklisting, *Radovich* v. *National Football League*, 352 U.S. 445, 1 L. ed. 2d 456, 77 S. Ct. 390 (1957), nor "no switch" agreements, *Nichols* v. *Spencer International Press, Inc.*, 371 F.2d 332 (Seventh Cir. 1967), nor commission sales agents, *Dailey* v. *Quality School Plan, Inc.*, 380 F.2d 484 (Fifth Cir. 1967). There is no suggestion whatever that Plaintiff has been blacklisted for employment by anyone, including the Defendants nor that there is any agreement between the Defendants or anyone else to not employ each other's employees for a period of time, and Plaintiff does not claim to be a commission sales agent with a competitive territory upon which his earnings depend, even in part. Plaintiff claims only to be a salaried employee.

Recently, in *Wilson* v. *Ringsby Truck Lines, Inc.*, 320 F. Supp. 699 (Colo. 1970), Judge Arraj held that employees who alleged that their earnings were diminished by reason of claimed antitrust violations of their employer could have standing to sue their employer and denied the employer's motion to dismiss. That case may be distinguished from the case at hand in several ways. First, Judge Arraj had before him only the narrow question of the legal sufficiency of plaintiff's action on a motion to dismiss whereas the questions presented here on summary judgment motions require this Court to treat with the legal and factual sufficiency of Plaintiff's case as the same has been developed since it was filed. Each case must stand on its own facts and the facts concerning

Plaintiff's alleged direct injury here are not in dispute and are deemed controlling of the legal result. Next, the matter of "proximate cause" as related to direct injury was not developed in the Colorado case, whereas, it has been fully developed herein.[3] Finally, the Court is of the opinion that Judge Arraj has rejected the teaching of our Circuit in *Nationwide Auto Appraisers Service, Inc.* v. *Association of Casualty and Surety Companies,* 382 F.2d 925 (Tenth Cir. 1967) by reading the direct injury requirement out of the case. Federal statutory law did not supplant the common law but incorporated it. 1 Von Kalinowski, Antitrust Laws and Trade Regulation § 1.02, pp. 1-21 to 1-34. Absent any clear expression on the part of Congress in 15 U.S.C.A. § 15 or our Circuit that the familiar principle of proximate cause should be eliminated from antitrust actions under 15 U.S.C.A. § 15, this Court is not willing to do so. Therefore, assuming, but without deciding, that Plaintiff's employment with Sunray was a property right within the meaning of 15 U.S.C.A. § 15, *Nichols* v. *Spencer International Press, Inc., supra,* the undisputed facts of the termination of his employment do not establish that such termination was the direct and proximate result of the Defendants' merger as a matter of law. Plaintiff himself states he could have continued in employment had he transferred to Dallas. However, he attempted to impose on Sunray the condition that he remain in Tulsa, a right he did not possess by contract or otherwise. Even in the absence of Defendants' merger he could have been required to transfer to another city or he could have been terminated. The Court concludes that his stated desire as to the place of his employment was the proximate cause of his termination of employment as a matter of law.

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3. That "proximate cause" may be a question of law under certain circumstances and thereby make a case ripe for summary disposition see *Haworth* v. *Mosher,* 395 F.2d 566 (Tenth Cir. 1968).

Summary disposition of Plaintiff's standing to sue in this case is in order. In *Nationwide Auto Appraisers, supra,* our Circuit affirmed a summary disposition by this Court of an antitrust claim on the basis that direct injury had not been shown by the pleadings and matters offered in support thereof. Summary proceedings have long been recognized as an appropriate vehicle for disposition of the standing to sue question. *SCM Corporation* v. *Radio Corporation of America,* 407 F.2d 166 (Second Cir. 1968); *Productive Inventions* v. *Trico Products Corp.,* 224 F.2d 678 (Second Cir. 1955). The undisputed facts now before the Court do not reveal a direct and causal connection between the Defendants' merger and the alleged injury to Plaintiff as a matter of law.

Other issues raised by the parties need not be treated within view of the result reached by the Court on the controlling issue of standing to sue.

Defendants' Motion for Summary Judgment is granted and Plaintiff's Motion for Partial Summary Judgment is denied. Counsel for Defendants is requested to prepare an appropriate judgment for entry herein and submit the same to the Court within fifteen (15) days of the date hereof.

It is so ordered this 20 day of May, 1971.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX F

MANS ET AL. v. SUNRAY D-X OIL CO. ET AL.

JUDGMENT

(Filed June 7, 1971)

This cause comes on for disposition upon Plaintiffs' Motion for Partial Summary Judgment and upon Defendants' Motion for Summary Judgment. The Court has considered the depositions, affidavits, pleadings, arguments and all matters of record herein presented to the Court by the parties herein and has determined for the reasons set forth in its Order of May 20, 1971 that Plaintiffs' action should be dismissed.

Wherefore, it is ordered, adjudged and decreed that Plaintiffs' action herein is hereby dismissed and judgment is hereby entered in favor of the Defendants and against the Plaintiffs.

Dated this 4 day of June, 1971.

/s/ Fred Daugherty
Fred Daugherty
United States District Judge

APPENDIX G

JOBE ET AL. v. AMERADA ET AL.

COURT OF APPEALS DECISION

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT
Office of the Clerk
Denver, Colorado 80202

Howard K. Phillips
Clerk

Telephone
303-837-3157

February 6, 1973

Stan P. Doyle, Esquire
Attorney at Law
P. O. Box 4470
Tulsa, Oklahoma 74104

Re: No. 72-1341, Del Jeannene Jobe, etc., et al. v. Amerada Petroleum Corporation, et al.

Dear Mr. Doyle:

Enclosed is a copy of the opinion of the Court in the above case. Judgment in accordance with that opinion has been entered today.

Very truly yours,

Howard K. Phillips, Clerk
By: /s/ Lavon M. Irlbeck,
Lavon M. Irlbeck,
Deputy Clerk

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Enclosure

cc: Richard B. McDermott, Esquire, Attorney at Law, 1300 National Bank of Tulsa Building, Tulsa, Oklahoma 74103

Joseph W. Morris, Esquire, Amerada Hess Corporation, P. O. Box 2040, Tulsa, Oklahoma

William E. Jackson, Esquire, Attorney at Law, 1 Chase Manhattan Plaza, New York, New York

Do not Publish
(See Rule 17)

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

January, 1973, Term

No. 72-1341

DEL JEANNENE JOBE, individually and on behalf of employees of the previously existing Amerada Petroleum Corporation, the employees of the previously existing Hess Oil and Chemical Corporation, and the employees and previous employees of Amerada Hess Corporation,
Plaintiffs-Appellants,

v.

AMERADA PETROLEUM CORPORATION, HESS OIL AND CHEMICAL CORPORATION and AMERADA HESS CORPORATION,
Defendants-Appellees.

Appeal from the United States District Court
for the Northern District of Oklahoma
(District Court No. 70-C-57)

(Filed February 6, 1973)

Stan P. Doyle, Tulsa, Oklahoma, for Plaintiffs-Appellants.

Richard B. McDermott, Tulsa, Oklahoma (Joseph W. Morris, Tulsa, Oklahoma, and William E. Jackson, New York, New York, on the brief), for Defendants-Appellees.

Before PHILLIPS, HILL and HOLLOWAY, United States Circuit Judges.

PER CURIAM.

Appellant Del Jeannene Jobe, individually and on behalf of employees of several merged companies, appeals from an order granting defendants' motion for summary judgment and dismissing her action in the Northern District of Oklahoma. The dismissal was bottomed on the determination that Jobe lacked standing to sue for loss of employment resulting from an alleged illegal merger.

Appellees Amerada Petroleum Corporation and Hess Oil and Chemical Corporation entered into a merger agreement which received stockholder approval on May 15, 1969. Appellant Jobe was one of Amerada's employees who was terminated on February 2, 1970, as a result of the merger.

Appellant asserts that Section 4 of the Clayton Act protects her right to work by allowing a person injured in her "business or property" to challenge the corporate merger which injures her employment rights. Supporting this conclusion appellant cites Sherman 1 and Clayton 7 and 16. In Reibert v. Richfield Co., et al, ... F.2d ..... (10th Cir. 1973), we determined neither the Clayton Act nor the Sherman Act protects one who loses employment as a result of an alleged illegal merger. Our exhaustive analysis in Reibert clearly indicates employees are not within the area of competition protected by the above stated acts, and we need not elaborate here.

Appellant poses other questions on her appeal pertaining to procedural matters in the trial court. Because of our determination of the standing to sue issue, we need not reach these other questions.

AFFIRMED.

APPENDIX H

JOBE ET AL. v. AMERADA ET AL.

FINDINGS AND RECOMMENDATIONS OF MAGISTRATE

(Filed March 20, 1972)

This matter comes on for hearing on this 11th day of January, 1972, before the undersigned Magistrate, upon motion of the defendants for summary judgment, and for stays of further discovery in the cause. Upon stipulation of counsel the cause was submitted upon briefs previously filed and identified in the memorandum attached to the defendants' motion.

Upon the defendants' motion for summary judgment, the Magistrate finds upon undisputed facts reflected by the pleadings, discovery depositions, and other discovery documents filed in the action:

(1) Each of the appearing plaintiffs, Del Jeannene Jobe, Robert R. McDole and Roy E. Michael, was a salaried employee of the defendant Amerada Petroleum Corporation, who continued briefly in the employ of Amerada Hess Corporation under contract of employment which was terminable at the will of either employer or employee.

(2) Plaintiffs had no other interest or concern in the business of Amerada Petroleum Corporation or of Amerada Hess Corporation than their respective employment for personal services terminable as above found.

(3) Each plaintiff's employment was unrelated to any of the business operations of his employer al-

leged in the Complaint to have been restrained by any violation of the anti-trust laws.

(4) None of the appearing plaintiffs was employed in any activity upon behalf of the defendants or either of them which was within the target area of any restraint alleged in the Complaint.

(5) None of the plaintiffs was injured in business or property by anything forbidden by the anti-trust laws.

(6) Each appearing plaintiff's injury, if any, was indirect, incidental, derivative and remote with respect to any violation of the anti-trust laws, and therefore is not actionable under Section 4 of the Clayton Act (15 U.S.C. 15).

(7) In view of the preceding findings, defendants' motion for summary judgment should be sustained upon the authority of Nationwide Auto Appraiser Service, Inc. v. Association of Casualty and Surety Cos., 382 F.2d 925 (10th Cir. 1967); Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51 (CA-9) cert. den. 342 U.S. 919 (1952); Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183 (CA-2, 1970) cert. den. 401 U. S. 923 (1971); Mans v. Sunray DX Oil Co., No. 70-C-140, USDC-DC-Okla. (May 20, 1971); Contreras v. Grower Shipper Vegetable Assn., 1971 Trade Cases, paragraph 73,592 (ND-Calif. 1971); Bywater, et al v. Matshushita Elec. Ind. Co., Ltd., et al, 1971 Trade Cases, paragraph 73,759, and other cases cited in defendants' briefs.

(8) In view of the finding that the appearing plaintiffs have no standing to sue upon the claims asserted, they have no capacity to represent others who might or might not have claims in the pleaded premises.

In view of the findings and recommendations hereinbefore set forth upon defendants' motion for summary judgment, further discovery and all pending discovery should be stayed pending the other and further order of the court.

The request of the plaintiffs for pre-trial conference in the presence of the court should be overruled.

In view of the findings and recommendations upon the defendants' motion for summary judgment, the plaintiffs' request for determination of a class action should be overruled, and certification of a class should be denied.

IT IS, THEREFORE, RECOMMENDED BY THE MAGISTRATE THAT:

1. The defendants' motion for summary judgment should be sustained, the plaintiffs' cross motion for partial summary judgment should be denied, and judgment of dismissal upon the merits should enter for the defendants.

2. All further and pending discovery in the action should be stayed pending the further order of the court.

3. Plaintiffs' request for pre-trial conference in the presence of the court should be denied.

4. Plaintiffs' motion for determination of a class should be overruled, and certification of a class should be denied.

FILED AND ENTERED this 11th day of January, 1972.

/s/ Morris L. Bradford
Morris L. Bradford, Magistrate

Form Approved:

/s/ Stan P. Doyle
For Plaintiffs

/s/ R. B. McDermott
For Defendants

APPENDIX I

JOBE ET AL. v. AMERADA ET AL.

ORDER

(Filed March 20, 1972)

After reviewing the file and record in this case, the findings and recommendations of the Magistrate are hereby approved, and

IT IS SO ORDERED.

The Clerk of the Court shall forward by mail a copy of this Order to each of the attorneys for the appearing plaintiffs and for the defendants.

Dated this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

JOBE ET AL. v. AMERADA ET AL.

JUDGMENT

(Filed March 20, 1972)

This action came on for hearing before the Court, Honorable Allen E. Barrow, Chief District Judge, presiding, and the Motion For Summary Judgment made by the defendants having been sustained, and plaintiffs' Cross Motion For Partial Summary Judgment denied, and due entry thereof having been made,

IT IS ORDERED AND ADJUDGED

That the plaintiffs and each of them take nothing upon their Complaint, that this action is dismissed upon the

merits, and that the defendants have and recover of and from the plaintiffs, their costs of action.

Dated at Tulsa, Oklahoma, this 20 day of March, 1972.

/s/ Allen E. Barrow
United States District Judge

Form Approved:

/s/ Stan P. Doyle
For Plaintiffs

/s/ R. B. McDermott
For Defendants

APPENDIX J

STATUTES INVOLVED

SHERMAN ACT

Section 1 (15 U.S.C. Sec. 1)

"Every contract . . . in restraint of trade or commerce . . . is declared to be illegal."

CLAYTON ACT

Section 4 (15 U.S.C. Sec. 15)

Suits by persons injured; amount of recovery.

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, Sec. 4, 38 Stat. 731.

Section 7 (15 U.S.C. Sec. 18)

That no corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Section 16 (15 U.S.C. Sec. 26)

Injunctive relief for private parties; exception.

Any person, firm corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18 and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: Provided, That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. Oct. 15, 1914, c. 323, Sec. 16, 38 Stat. 737.

INTERSTATE COMMERCE ACT

Section 5 (2) (a)

Unifications, mergers, and acquisitions of control.

It shall be lawful, with the approval and authorization of the Commission as provided in subdivision (b) of this paragraph.

Section 5 (2) (c)

In passing upon any proposed transaction under the provisions of this paragraph, the Commission shall give weight to the following considerations, among others: (1) The effect of the proposed transaction upon adequate transportation service to the public; (2) the effect upon the public interest of the inclusion, or failure to include, other railroads in the territory involved in the proposed transaction; (3) the total fixed charges resulting from the proposed transaction; and (4) the interest of the carrier employees affected.

Section 5 (2) (f)

As a condition of its approval, under this paragraph, of any transaction involving a carrier or carriers by railroad subject to the provisions of this chapter, the Commission shall require a fair and equitable arrangement to protect the interests of the railroad employees affected. In its order of approval the Commission shall include terms and conditions providing that during the period of four years from the effective date of such order such transaction will not result in employees of the carrier or carriers by railroad affected by such order being in a worse position with respect to their employment, except that the protection afforded to any employee pursuant to this sentence shall not be required to continue for a longer period, following the effective date of such order, than the period during which such employee was in the employ of such carrier or carriers prior to the effective date of such order.

Section 5 (b) (9)

Parties to any agreement approved by the Commission under this section and other persons are, if the ap-

proval of such agreement is not prohibited by paragraph (4), (5), or (6) of this section, relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the terms and conditions prescribed by the Commission.

OKLAHOMA STATUTES

10 Okla. Statutes (1971) Sec. 12

Maintenance of poor persons by parents—Promise of adult child to pay for necessaries

It is the duty of the father and the mother of any poor person who is unable to maintain himself by work, to maintain such person to the extent of their ability. The promise of an adult child to pay for necessaries previously furnished to a parent is binding.

32 Okla. Statutes (1971) Sec. 3

Duty to support

The husband must support himself and his wife out of the community property or out of his separate property or by his labor. The wife must support the husband when he has not deserted her out of the community property or out of her separate property when he has no community or separate property and he is unable from infirmity to support himself.